IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 165

MAX LERNER,

Appellant,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting the New York City Transit Authority,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE STATE OF NEW YORK *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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Statement

This brief is filed by the State of New York by its Attorney General in support of the constitutionality of Chapter 233 of the Laws of New York of 1951, popularly known as the New York Security Risk Law, and of the application of the statute to this appellant.

The Attorney General similarly appeared in this litigation in the State Courts of New York. The Attorney General was invited by counsel to the Transit Authority at the outset of the litigation to participate in it.

The Attorney General is appearing in the case not only pursuant to his duty under New York Executive Law § 71 to appear in support of the constitutionality of a State statute when the constitutionality is challenged, but he is appearing, in essence, on behalf of the New York State Civil Service Commission. This is because the initial responsibility for administering the New York Security Risk Law is, by its provisions (summarized *infra*), placed upon the State Civil Service Commission. The Commission is the official agency having the primary duties under this statute to set in motion all other proceedings that take place pursuant to it. The first administrative step under this statute is the designation of security agencies and security positions. Such designation is made by the State Civil Service Commission. The Commission also has appellate jurisdiction, by provision of the statute, to review a determination of the employing agency relative to an employee, at the instance of the employee claiming to be aggrieved thereby.

The State Civil Service Commission was not made party respondent in the instant case, apparently because appellant here did not utilize the provisions for appeal to the Commission from the Transit Authority's determination, but instead brought the present proceeding.

Jurisdiction

A motion was made by appellees to dismiss this appeal. In opposition thereto, appellant filed a brief. This Court made its order on October 14, 1957, postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. p. 76; 355 U. S. 803).

This Court Should Not Take Jurisdiction of the Appeal

We are in accord with the position taken by appellees on the motion to dismiss the appeal. The grounds urged were that (1) no substantial Federal questions are presented, and (2) in part, the Federal questions appellant seeks to raise were not timely or properly raised or expressly passed upon by the State Courts. The second contention has in effect been partially conceded by appellant in his brief filed in opposition to the motion to dismiss the appeal (pp. 9-10 of that brief). In his brief on the merits, appellant has indeed omitted from his enumeration of Questions Presented (R. pp. 2-3), the question numbered 7 in his Notice of Appeal.

In the Argument, we shall show that neither the statute involved nor the action taken under it in respect to appellant, violates any provision of the Constitution, and that prior decisions by this Court and the principles enunciated by this Court upon which these decisions rest, clearly support both.

Consequently, the appeal presents no substantial Federal question. Nor is the case an appropriate one for certiorari as contended by appellant (Br. p. 11), since the State Court in this case did not decide a Federal question of substance not heretofore determined by this Court but decided the Federal questions raised in accord with applicable decisions of this Court.

The Decisions of the Courts Below

The opinions of the New York Court of Appeals are reported in 2 N. Y. 2d 355.

The opinions of the New York Appellate Division are reported in 2 A. D. 2d 1.

The opinion of the New York Supreme Court, Kings County is reported in 138 N. Y. S. (2d) 777 (not officially reported).

The Material Facts

The three Courts of this State before which this case has come have all concurrently held (1) that the Security Risk Law is valid and constitutional, and (2) that the determination of appellees as members of the New York City Transit Authority as to the scope, and application to appellant, of the law was neither arbitrary nor capricious but should be approved.

On November 23, 1953, the State Civil Service Commission declared the New York City Transit Authority to be a security agency within the meaning of the Security Risk Law.

The Commission on March 24, 1954 by Resolution listed the Communist Party of the United States and of the State of New York as subversive within the meaning of the Security Risk Law. This was based upon and was an adoption of such listing of the Communist Party by the State Board of Regents under the Feinberg Law (N. Y. Laws 1949, ch. 360). The Regents acted after hearings, at which the Communist Party appeared by counsel, caused testimony to be taken, submitted briefs and made oral arguments.

The facts as to appellant as here set forth are taken from appellant's petition and exhibits attached thereto. Appellant was a conductor on the New York City subways, which are operated by the Transit Authority, the appellees, the facilities being owned by New York City (R. p. 6). On

September 14, 1954, pursuant to instructions from his supervisor, he appeared at the office of the Commissioner of Investigation of the City of New York (R. p. 6). He refused to answer questions as to whether or not he was a member of the Communist Party, and invoked the Fifth Amendment (R. p. 10). He was advised of the provisions of the Security Risk Law and given an opportunity to reconsider his refusal (R. p. 10). On September 21, he appeared at the office of the Department of Investigation and was granted time to engage counsel (R. p. 10). On September 30, he appeared with counsel and was granted a further adjournment (R. p. 10). On October 8, he appeared with counsel, was advised that the investigation was being conducted as authorized by the Mayor, pursuant to the Security Risk Law (R. p. 7). He again "refused to answer questions as to whether he was then or had been a member of the Communist Party, and again invoked the Fifth Amendment" (R. p. 10). On October 21 (two weeks later), the New York City Transit Authority, by its General Manager, wrote to appellant, informing him that he was suspended from his position, effective at close of business the following day, pursuant to Section 5 of the Security Risk Law, and that he had the opportunity, within 30 days, to submit statements or affidavits to show why he should not be reinstated (R. pp. 10-11). The letter suspending him enclosed a copy of the Transit Authority's Resolution of suspension stating the reason therefor (R. pp. 10-12), and informed appellant:

> "* * * This action has been taken because * * * when testifying under oath at the office of the Commissioner of Investigation of The City of New York, you refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States. Furthermore, having been advised of the provisions of the Security Risk Law (L. 1951, C. 233, as amended),

and after having been given an opportunity to reconsider your refusal, and having been given a postponement * * * to engage counsel, and a further adjournment at the request of your counsel * * * you appeared with counsel * * * and again refused to answer questions as to whether you were then or had been a member of the Communist Party and again invoked the Fifth Amendment to the Constitution of the United States.

You have the opportunity, within thirty days after this notification, to submit statements or affidavits to show why you should be reinstated or restored to duty. * * *"

Nothing was heard from appellant and, on November 24, 1954, the Transit Authority wrote him, terminating his employment, stating the reasons therefor, and enclosing a copy of the Transit Authority's Resolution of termination which also stated the reasons for termination of the employment (R. pp. 13-15).

Two weeks after the termination of his employment, appellant brought the proceeding which is here on appeal. Appellant did not appeal to the Civil Service Commission, as he might have under Section 1106 of the Security Risk Law (summarized *infra*). Thus he did not exhaust the remedies which were given him under the statute. Had he appealed, he would have had pursuant to § 1106, a hearing, and the right to appear by counsel and produce evidence. The Civil Service Commission is empowered by the section to reverse or modify the determination of the employing agency.

The Statute Involved

The statute here before the Court is commonly known as the "Security Risk Law" and will be so referred to in this brief. The law was adopted in 1951 (L. 1951, ch. 233) with

June 30, 1952 as its terminal date. It has been extended annually since then. Its present terminal date is June 30, 1958* unless again extended. Recommendations are before the Governor that the law be continued.

In the first section (§ 1101) there is set forth the declaration of legislative findings and intent. "Security agency" and "security position" are defined (§ 1102). The duty of designating such agencies and positions is placed upon the State Civil Service Commission.

In § 1105 is provided the ground upon which a state or municipal employer may take action under the statute. It is when "upon all the evidence, reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state." The section provides the alternative actions which the employer may take in such event, and the procedure to be followed. The employee initially may be transferred from his position to a nonsecurity position or he may be suspended. He has "opportunity" within thirty days to "submit statements or affidavits to show why he should be reinstated or restored to duty". The employer may then, after review of its prior action affirm the transfer, or terminate the employment, or restore the employee to his position with back pay for the period of suspension.

Appeal by the employee to the State Civil Service Commission is provided in § 1106. The proceedings to be had upon such appeal are specified. They are:

1. A hearing is mandated at a set time and place upon due notice.

* The law is to be found in McKinney's Unconsolidated Laws of New York §§ 1101-1108, and the reference to it in this brief will be to the sections of it in that compilation.

2. The Commission or person or persons it designates has power to "require amplification of the reasons" for the action appealed from; to hold public or private hearings; to subpoena and compel the attendance of witnesses, and the production of books, papers, records and documents; to make such inquiry as he deems advisable.

3. Appellant must on request be permitted to be represented by an attorney and to present evidence in his behalf.

4. The Commission may affirm, reverse or modify the determination it is reviewing.

5. If it reverses, the employee is reinstated with back pay to a dismissed employee to the date of suspension.

Section 1107 provides that the evidence upon which a determination may be based *may include* "to the extent deemed appropriate, *but* • • • shall *not be limited* to evidence of" four forms of conduct. One of these is "membership in any organization or group found by the State Civil Service Commission to be subversive" (emphasis supplied).

Section 1108 provides that a subversive group or organization, as used in the law, shall be one found by the State Civil Service Commission, after inquiry and appropriate notice and hearing, to advocate the overthrow of the government by force and violence, or so designated by the United States Attorney General of by the State Board of Regents pursuant to the Feinberg Law, provided these designations were made upon notice to the organization or group and opportunity afforded to answer.

Construction of Security Risk Law by New York State Civil Service Commission and the New York courts in respect to necessity that employees be in security positions for application of the law to them.

The New York State Civil Service Commission has construed the Security Risk Law as making an employee dismissable from a security agency only when his position is such that by sabotage, disclosure of governmental information or by other means, he is in a situation where he can imperil the security and defense of the nation and state; that this factor must be present coupled with a determination that the employee is of doubtful trust and reliability.

This construction was contained in an opinion rendered by the Commission in *Matter of Reif* on May 10, 1957. It was followed by an opinion to the same effect in *Matter of Wyatt* rendered on August 12, 1957. The Commission's construction was upheld on January 8, 1958 by the New York Supreme Court, New York County (Mr. Justice Francis X. Conlon) in *Matter of Jacobs* v. *Falk, et al.* and *Matter of New York City Housing Authority* v. *Falk, et al.* (New York Law Journal, January 10, 1958, p. 5, columns 5-6; unreported). The two proceedings were brought by the agencies employing Reif (*Matter of Jacobs*) and Wyatt (*New York Housing Authority*).

This construction of the statute is implicit in the Court of Appeals opinion in the instant case, since the Court affirmed the discharge of appellant as proper, because as a subway conductor he was in a sensitive or security position (R. p. 61).

Since this Court holds that construction of a statute by the department or agency which administers it is to be accepted by the courts if there is a "rational basis" for it

(*Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 146 [1939]; *Board* v. *Hearst Publications*, 322 U. S. 111, 131 [1944]), and since this Court deems itself concluded by the interpretation of a State statute by the highest Court of the State of its enactment (*Barsky* v. *Board of Regents*, 347 U. S. 442, 448 [1954]; *Standard Oil Company* v. *New Jersey*, 341 U. S. 428, 432 [1951]), this Court is to weigh this statute as one which can affect only employees in security or sensitive positions.

Appellant has appended as an Appendix B to his brief (pp. 42-46) the interim report of the Committee on Public Employee Security Procedures, appointed by the Governor of New York in September 1956. The Committee issued its final report on January 8, 1958*, expressing satisfaction with the construction of the statute by the New York State Civil Service Commission and the view of the Committee that this construction is "in accord with the basic objective of a 'security' law".

The Question Presented

The main issue before this Court upon this appeal is whether a government employer administering a State law which authorizes the discharge of an employee from a security position when "reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state", may discharge an operating employee of the New York City subway system for refusal to answer the question asked him

* The report was issued prior to the decisions of the Supreme Court, New York County, in *Matter of Jacobs* and *N. Y. City Housing Authority*, *supra*, which upheld the Commission's construction of the law.

by his employer whether he is a member of the Communist Party.

A secondary question also arises, by the act of appellant in coupling his refusal with an invocation of the Fifth Amendment, to wit: may this employee by such invocation block the employer's performance of the duty imposed on it by law to ascertain whether persons "of doubtful trust and reliability" are occupying "security positions."

That these are the issues, and that their formulation in appellant's brief is inaccurate, is shown by reference to the opinion of the Court of Appeals of New York, which held:

1. "The Transit Authority has been properly denominated a security agency." It performs a function necessary to the security or defense of the nation and the state. "The most important facility for the evacuation of the people," in the event of an enemy raid on New York City "would be the subway system" (R. pp. 58, 61).

2. If appellant were a member of the Communist conspiracy, he would, in his position as a subway conductor, be a "very real threat to the security of the State and of the City" (R. p. 61).

3. Appellant's refusal to reply to the crucial question of Communist Party membership was evidence of doubtful trust and reliability, the ground for discharge under the statute (R. pp. 59, 63).

4. Appellant was not discharged on the ground that he was a Communist Party member. "No inference of membership * * * was drawn from * * * refusal to reply to the question asked" (R. p. 63).

5. Appellant's explanation that he refused to answer because to do so would tend to incriminate him, did not change his having "given evidence of his own untrustworthiness and unrealiability" by refusing to answer the question (R. pp. 60, 64).

6. Current events confirm the need for this statute and the wisdom of the Legislature in enacting it (R. p. 61).

7. The instant case is altogether distinguishable from *Slochower* v. *Board of Education*, 350 U. S. 551 [1955] (R. p. 63).

8. Appellant's dismissal does not abridge his privileges and immunities as a citizen of the United States since it was "to thwart his employer in ascertaining whether or not he is a member of a criminal conspiracy" that he asserted his constitutional privilege (R. p. 64).

9. The Transit Authority is an agency governed by the Security Risk Law. The Commissioner of Investigation was its agent in making the inquiry of appellant (R. pp. 56-57).

Summary of Argument

1. This appeal does not present questions such as those framed by appellant. Appellant's argument throughout his brief is premised on a misstatement of the ground for discharge and of the holding of the State courts.

2. Appellant's refusal to answer the question as to whether he was a member of the Communist Party was the ground for his discharge. Under the decisions of this Court the government agency employing him

was entitled to have the answer to this question from him.

3. The added plea by appellant of the Fifth Amendment does not nullify the right of his government employer to dismiss him for refusing to give it the information it is entitled to have from him, as to whether he is a member of the Communist Party.

4. A number of appellant's arguments are foreclosed by the construction placed upon this statute by the highest court of the State of New York.

5. Appellant was not dismissed as being a member of the Communist Party. Therefore all of appellant's arguments in respect to the validity of the discharge for Communist Party membership are not to be considered by this Court, in keeping with its policy not to reach questions of constitutionality until a concrete situation is before it which inescapably presents them. Moreover, appellant's arguments on the subject are adverse to prior decisions by this Court and the principles on which they are based.

6. Government may provide for removal of persons of doubtful trust and reliability as security risks, from sensitive positions. Appellant was employed in a security position.

ARGUMENT

POINT I

Prior decisions of this Court and the principles upon which these rest sustain the right of the Transit Authority to dismiss appellant as of doubtful trust and reliability because of his refusal to answer the question whether he is or was a member of the Communist Party.

A.

The principles underlying (1) the right of government to provide that employees in security and sensitive positions be of undoubted trust and reliability, and (2) the obligation of the government employee to inform his employer as to whether he is a member of the Communist Party.

Before citing the decisions of this Court which, we submit, are precedent in support of the determinations in the instant case by the State courts, we consider certain fundamental principles underlying and threading through these decisions. They are principles which have inevitably evolved because inevitably situations have arisen presenting the problem of accommodating the rights and liberties guaranteed to the individual by the Constitution with the necessity for safeguarding the public interest. Public interest has indeed been deemed to require balancing with individual rights, not only when the very existence of the government and the nation under which that Constitution with its guaranteed rights and liberties may be preserved are involved, but in respect to less acute aspects of that interest.

The principles are not new ones conceived in haste or in fear to meet the problems of this day and era, sacrificing

for expediency's sake individual freedoms to national security.

Great and liberal judges a half century ago, in an age when there was no thought of danger to the security of this nation from without or from within understood that

> "* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual * * *." (Mr. Justice Holmes in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110 [1911]).

In 1921, in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 414, this Court warned that

> "* * * The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it."

In the last decade has arisen the problem of reconciling the right of an individual to be a member of the Communist Party, if he is so minded, with the need of the Nation to protect itself against the threat that Communism holds for it. Those most dedicated to the ideal of individual liberty acknowledge that the Communist Party is not simply a political party; that it has ties with the Soviet government; that traditionally it has advocated the use of force and violence to achieve its goals; that therefore Communism and the Communist Party present a specific type of problem.

The legislative and executive branches of our government have striven and are striving to meet this special problem on both fronts which Communism is known to em-

ploy: preparation for war and subversion. For our Nation's protection our government is endeavoring to match Communist missiles, satellites, atomic and hydrogen bombs, planes and other armaments. For our Nation's protection our government seeks to meet by means of security legislation, Communist subversion and infiltration in its ranks. Those most dedicated to the ideal of individual liberty recognize that our government need not remain passive and permit such subversive infiltration. However one may dislike the need for such legislation as qualifying the concept of complete liberty of the individual, the constitutional issue which it presents is not whether it limits at all the liberty set forth in the Bill of Rights. Of course it does. Unrestricted liberty is not possible, does not exist and never has existed in the United States or in any organized society. The rules of the road, the need for a license to drive a car or get married, every penal law in the land is a restraint of individual liberty in the interest of the public as a whole. It is the restraint constitutionally permissible because the words of the Bill of Rights cannot, as Mr. Justice Holmes said (*Noble State Bank* v. *Haskell, supra*, 219 U. S. 104, 110 [1911]), be pressed "to a drily logical extreme".

The effect of security legislation upon the liberty of the individual to be a member of the Communist Party without the necessity for disclosing such fact to an employer in certain circumstances, and without in some form or in some manner being damaged by the exercise of his freedom to be a member of the Communist Party, is another instance of "striking a balance" (*Dennis* v. *U. S.*, 341 U. S. 494, 561 [1951]) between the total liberty of any one individual and the interests and welfare of every individual in the land united as a nation.

B.

Government may constitutionally enact legislation to protect the nation, the states and all units of government against persons of doubtful trust and reliability in security positions.

The premise of *Cole* v. *Young*, 351 U. S. 536 (1956) is that persons of doubtful trust and reliability may be dismissed from security positions in government.

Appellant, an operating employee of the New York City Subway System, was employed in a security position. The subway system in New York City is its lifeline. In *New York City Transit Authority* v. *Loos*, 2 N. Y. Misc. 2d 733, 738 (1956) the Court pointed out:

> "It is easy to forget, while the subways are running, that there is room for motor vehicles on the streets only because millions travel by subway; for if all persons had to use surface transportation, the bridges and tunnels and main highways would soon be hopelessly clogged. New York with its immense territory and its five separate boroughs, * * * is dependent for its very life and daily functioning, and for the immediate safety of its 8,000,000 inhabitants, on rapid transit facilities which are necessarily used by nearly all persons engaged in all of its governmental and other vital functions. Whatever may be the case elsewhere, and under other conditions, whatever may have been the case in other times, here and now, and for this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare. It is worth re-emphasizing that the subways are the city's arteries upon which its life and daily living depend. * * *"

Appellant would minimize the significance of his occupation. We venture to say, however, that a subversive organization would sooner have as an adherent a utility company employee situated so that he can obstruct its

mechanical and physical operation than the Chairman of the Board. The late Mr. Justice Jackson pointed out in his concurring opinion in *Dennis* v. *United States*, 341 U. S. 494, 564 (1950):

> "The Communist Party * * * seeks members that are, or may be, secreted in strategic posts in *transportation*, communications, industry, government * * *." (emphasis supplied.)

The reasons why operating personnel of transportation systems and utilities must be persons whose loyalty is beyond question, is self-evident: One person, whatever his position, is in a situation where he could paralyze, disrupt or create panic in a community, causing it to become fertile field and easy prey to enemy action. A subway conductor in New York City does not occupy the innocuous position that appellant would portray. Wearing a uniform, having a badge and a pass, he has access to premises of the system from which the whole operation of the subways is controlled. If there were among the subway conductors a person who was dedicated to carrying out enemy purposes, he would be able to get to vulnerable points where persons not so employed could not.

Whether or not a member of the public could, as appellant contends, cause the disruption of subway operation by some means, it is not required by the Constitution that government hire and retain someone to do it.

The premise in the *Cole* case also is (id. p. 546) that the procedure provided in security legislation would be summary.

The premise in that case, further, is acceptance by this Court of the propriety at this time of enactment or continuance of security legislation, which appellant questions

(Br. p. 21). The Court of Appeals of New York found a continuing need for this statute (R. p. 61). Moreover, as has been said in a multiplicity of cases (*e.g., American Communications Association* v. *Douds, supra,* 339 U. S. at pp. 400-1, 419), the Courts will not substitute their judgment for that of the legislative arm of government as to the necessity or desirability of a statute. This Court has also held that the need for retaining a law need not be the one which brought about its enactment. New circumstances or a new emergency will justify the renewal of a law which other circumstances or another emergency brought into being. (*East New York Savings Bank* v. *Hahn,* 326 U. S. 230, 235 [1945])

C.

Appellant's employer had the right to insist on being informed by him whether he was a member of the Communist Party, and he had no right to insist on resisting the demand as constitutionally objectionable. Appellant's refusal to answer the question justified his being determined to be of doubtful trust and reliability in a security position.

Appellant was discharged, as the Court of Appeals said (R. p. 63) "for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist Party membership."*

This Court has upheld the right of government to require its employees to disclose to it whether they are mem-

* By his refusal to answer the question, appellant raised "doubt" but that he might be a member with complete knowledge of and with ardent adherence to a goal of the Party of overthrowing our government by force and violence. Had he answered the question in the affirmative, he could have explained his situation; that is to say, either that he was not a member or that he was a member but that he did not understand Communist Party purposes to be advocacy of overthrow of the government, or subversion, or any designs against our nation's security.

bers of the Communist Party, and the obligation of government employees to give the employer this information. *Garner* v. *Los Angeles*, 341 U. S. 716 (1951).

Mr. Justice Clark, writing for the Court, stated why the inquiry may be made and why there is the obligation to answer (p. 720):

> "The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.
>
> We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

Mr. Justice Frankfurter, concurring, explained why the Constitution permits the eliciting of such information from the employee (pp. 724-726):

> "The Constitution does not guarantee public employment. City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such

endeavor. See *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56.

> • • • A municipality like Los Angeles ought to be allowed adequate scope in seeking to elicit information about its employees and from them. It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. In the context of our time, such membership is sufficiently relevant to effective and dependable government, and to the confidence of the electorate in its government. • • • the two employees who were dismissed solely because they refused to file an affidavit stating whether or when they had been members of the Communist Party or the Communist Political Association cannot successfully appeal to the Constitution of the United States."

Other decisions of this Court have recognized the legitimate concern of government with the fact of membership of an employee in the Communist Party, and the constitutional propriety of government taking measures to control the employment in government of members of the Communist Party.

Conspicuous decisions in this area are *Adler* v. *Board of Education*, 342 U. S. 485 (1952) and *Gerende* v. *Election Board*, 341 U. S. 56 (1951). In the *Adler* case this Court held that the State of New York could make membership in any organization listed by the State Board of Regents as advocating the overthrow of the government by force, violence or unlawful means, disqualification for employment in the public schools of the state. This Court declared (*supra*, 342 U. S. at p. 493)

> "In the employment of officials and teachers of the school system, the State may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the State,

when determining the fitness and loyalty of such persons, from considering the organizations with whom they associate."

In the *Gerende* case this Court held that the State of Maryland could validly require that in order for a candidate for public office to obtain a place on the ballot he must make oath that he is not knowingly a member of an organization engaged in an attempt to overthrow the government by force or by violence.

American Communications Association v. *Douds*, 339 U. S. 382 (1950) upheld the constitutionality of Section 9(h) of the National Labor Relations Act which denies the benefits of certain provisions of the Act to any labor organization whose officers have not filed with the National Labor Relations Board an affidavit to the effect that they are not members of the Communist Party. The case was the first, in recent years, which dealt with the need for reconciling the liberty of the individual to be a member of the Communist Party with the right of the public to be protected from members of the Communist Party in certain positions. The opinions of this Court carefully analyzed the arguments made in challenging the statute. The Court found that the Constitution did not prohibit the statutory requirement. Mr. Justice Jackson took cognizance of the fact that the oath was resented by many labor leaders, including those who were not Party members, and commented (pp. 434-5):

"• • • I suppose no one likes to be compelled to exonerate himself from connections he has never acquired. I have sometimes wondered why I must file papers showing I did not steal my car before I can get a license for it. But experience shows there are thieves among automobile drivers, and that there are Communists among labor leaders. The public welfare, in

identifying both, outweighs any affront to individual dignity."

It would appear to follow *a fortiori* that since the inquiry as to Communist Party membership is constitutionally proper as to all employees of a municipality (*Garner* v. *Board of Education, supra*), it is constitutionally proper to make this inquiry under a security risk law which is applicable only to employees in security positions; and that since the matter of Communist Party membership is relevant to fitness for employment as a teacher (*Adler* v. *Board of Education, supra*), to candidacy for any public office (*Gerende* v. *Election Board, supra*), to fitness of officers of labor unions (*American Communications Association* v. *Douds, supra*), it is relevant to fitness for security positions.

In answer to appellant's contention that the statute here does not explicitly provide for this inquiry as to Communist Party membership*, this Court will accept as conclusive (*Barsky* v. *Board of Regents, supra*, 347 U. S. 442 [1954]) the construction by the Court of Appeals of New York of the New York statute, as implicitly permitting this question to be asked, and the refusal to answer it as creating doubt as to trustworthiness and reliability (Court of Appeals op. R. pp. 63-4).

Appellant cites *Konigsberg* v. *State Bar of Los Angeles*, 353 U. S. 252 (1957). He suggests that the *Garner* case might be regarded as "overruled" or "narrowed" by the *Konigsberg* decision. The *Garner* case was not so much as

* Appellant argues that the statute in the *Garner* case gave warning that dismissal will follow nondisclosure. Appellant in the instant case was told by his employer when he refused to answer the question that this refusal would result in action being taken under the Security Risk Law (R. pp. 10-11).

mentioned in any of the opinions in the *Konigsberg* case, either the prevailing or the dissenting opinions. A case of its significance would not be overruled without express reference to it. The obvious reason why it was not necessary to refer to the *Garner* case in the *Konigsberg* case is that the two cases are in no wise similar; the issue in the one is wholly unrelated to the issue in the other. In the *Konigsberg* case the issue was whether the candidate for admission to the bar had established that he was of good moral character. This Court held that his refusal to tell the Bar Committee whether he was a member of the Communist Party did not constitute a failure to prove that he was of good moral character, which alone would justify refusal of admission to practice law. Neither side claimed that *Konigsberg* was denied admission to the bar for anything but a question of his moral character; neither side asserted that he was denied admission to the bar for refusal to answer the question as to Communist Party membership. The case had no relation to sensitive employment. A Communist of the highest moral character might indeed be so true and honest in his devotion to Communism that his danger in sensitive employment would be the greater. But a Communist as a lawyer could spend a life time at the Bar without being in any situation where he would be a threat to the security of the nation and State. The criteria for admission to the bar and for sensitive employment being completely dissimilar, the *Konigsberg* decision has no bearing on the principle of the *Garner* case, the principle which governs the instant case.

The same distinguishing factor makes inapplicable here *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957), which appellant also cites.

POINT II

Appellant was not discharged for pleading the Fifth Amendment. His adding the plea to his refusal to answer the question as to Communist Party membership cannot have the effect of blocking Government from exercising its right to dismiss him, as of doubtful trust and reliability, for refusing to reveal whether he is a member of the Communist Party.

The Court of Appeals held that "petitioner was not discharged for invoking the Fifth Amendment. He was discharged for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist Party membership" (R. p. 63). The Court went on to say (R. p. 64):

> "If, in refusing, the employee injects his claim of privilege under the Fifth Amendment, that circumstance is incidental or additional. The dismissal is still proper for refusing that vital, fundamental information. Were that not so, this would be the result: An employee may be dismissed for refusing to give information as to whether or not he is a Communist party member (*Garner* v. *Los Angeles Bd., supra*), but if with his refusal he draws into or adds to his words of refusal a claim that to answer might tend to incriminate him and he, therefore, claims the privilege to refuse to answer under the Fifth Amendment to the United States Constitution, he may not be dismissed. That cannot be."

Appellant's argument throughout his brief, on a hypothesis of dismissal for pleading the Fifth Amendment is, thus, a misstating of the fact, a misstating of the holding of the Court of Appeals, and obscures the question presented on this appeal.

Demonstrating that appellant was dismissed for the refusal to answer the question as to Communist Party mem-

bership and not because he pleaded the Fifth Amendment is the Transit Authority's action in *Matter of Hehir* v. *New York City Transit Authority*, New York Supreme Court, Kings County Index No. 4071 (1956).* *Hehir*, also an operating employee in the New York City Subway System, did not plead the Fifth Amendment when he refused to answer the question as to Communist Party membership. He, too, was dismissed for refusal to answer the question.

For the purpose of meeting the argument which appellant makes, based on his own formulated hypothesis of the ground for dismissal, we discuss the import of the Fifth Amendment and of a plea of the Fifth Amendment as delineated by this Court, notwithstanding that the question is not material on this appeal.

While no inference of guilt, of course, is to be drawn from the plea (and no such inference was drawn in this case, as the Court of Appeals said [Op., R. p. 63]), the "great value" of the privilege of the Fifth Amendment, as Chief Justice Warren said in *Quinn* v. *United States*, 349 U. S. 155, 162 (1955), is that it is a " 'protection to the innocent though a shelter to the guilty' ". The plea absolves of the duty to answer a question and relieves of liability to punishment for contempt for refusal to answer, only if an answer might tend to incriminate (*Quinn* v. *United States*, *supra*, at p. 162; *Emspak* v. *United States*, 349 U. S. 190 [1955]). Therefore appellant's criticism (Br. p. 13) of the statement in the Appellate Division opinion in the instant case, that the court was required to and should accept as truthful appellant's statement that answers to the questions propounded might have tended to incriminate him, is unwarranted. The Appellate Division

* Petitioner has asked the Court before which the case is pending not to proceed with its decision, awaiting the argument of the instant case.

statement is in accord with what this Court has declared to be the value of the plea and the permissible use of it.

The error of the concept of the Fifth Amendment as appellant argues it, is clear from the holding in *Ullmann* v. *United States, supra,* 350 U. S. 422, and the discussion of the Amendment in that opinion. From the enunciation of principle in that case, the following is derived: Essentially it is everyone's "duty to give testimony" before a body or officer authorized to hear testimony (cf. p. 439, footnote). The plea of the Fifth Amendment permits the withholding of testimony when to give it might expose to criminal prosecution. It is for this reason that this Court held in the case, that when the Immunity Act removed the possibility of prosecution, there was a requirement to testify, and the Fifth Amendment was thereby not violated. The Court so held notwithstanding that *Ullmann* argued that he would suffer (p. 430) "the impact of the disabilities imposed by federal and State authorities and the public in general—such as loss of job, expulsion from labor unions, State registration and investigation statutes, passport eligibility, and general public opprobrium". But Justice Frankfurter said that to satisfy the Fifth Amendment the immunity granted need only remove the danger of criminal prosecution (pp. 430-431).

Therefore assuming—purely *arguendo*—that the plea of the Fifth Amendment had any influence on the Transit Authority in adding to its doubt of appellant's trustworthiness and reliability, this was not violation of any constitutional right.

Mr. Justice Douglas in his dissenting opinion declared (p. 454):

> "It is no answer to say that a witness who exercises his Fifth Amendment right of silence and stands mute

may bring himself in disrepute. If so, that is the price he pays for exercising the right of silence granted by the Fifth Amendment."

Therefore, once more assuming—purely *arguendo*—that the plea of the Fifth Amendment did influence the Transit Authority in adding to its doubt of appellant's trustworthiness and reliability, it would have been "the price he [appellant] paid for exercising the right of silence granted by the Fifth Amendment."

Appellant relied in the State Courts and relies here on the *Slochower* case (350 U. S. 551 [1955]). Obvious factors distinguish the instant situation from that involved in *Slochower*. Both the Appellate Division and the Court of Appeals found this to be so (App. Div. Op. R. pp. 40-43; Court of Appeals, Op. R. pp. 62-64).

The cardinal differences between the *Slochower* case and the present one may be summed up as follows:

1. This Court expressly held that the employing governmental unit has the right to ask questions of its employee to determine his fitness for employment, citing its decision in *Garner* (350 U. S., at p. 558). That is the present case.

2. The hearing at which city employee Slochower pleaded the Fifth Amendment was before a Committee of the United States Congress. That is *not* this case. This hearing was by employer, New York City Transit Authority, conducted for it by the Commissioner of Investigation of New York City.*

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* The construction of the State statutes by its highest Court to the effect that the Transit Authority is a part of the State and City government covered by the Security Risk Law, and the Commissioner of Investigation of the City of New York is authorized to conduct in-

(Footnote continued on following page.)

The report in United States Law Week (24 U. S. Law Week, October 25, 1955, p. 3110, col. 3), of the oral argument in the *Slochower* case refers to Mr. Justice Frankfurter's comment in the course of the argument, that it makes a lot of difference whether a question is put by a United States Senator or by the city authorities.

3. The Congressional Committee questioning Slochower specifically announced that its inquiry was not directed at Slochower's conduct as a city employee. This is *not* this case. The hearing by Lerner's employer had one purpose only—to determine appellant's trust and reliability as its employee.

4. The *Slochower* case turns solely upon the validity of discharge pursuant to Section 903 of the New York City Charter, which was not concerned with the particular kind of official conduct as to which an employee refused to testify under the plea of the Fifth Amendment. This Court so treated it saying. (350 U. S. p. 558): "as interpreted and applied by the State Courts, it operates to discharge every city employee who invokes the Fifth Amendment. * * * No consideration is given to such factors as the subject matter of the

(Footnote continued from preceding page.)
vestigations for the Transit Authority will be regarded by this Court as conclusive upon it. *Barsky* v. *Board of Regents*, *supra*, 347 U. S. 442, (1954). Appellant's argument that because the purpose of the Security Risk Law is to protect the national security, the Commissioner of Investigation of the City of New York was acting as an agency of the federal government is so self-evidentially reasoning *reductio ad absurdum* that it is unnecessary to spell out the absence of logic in it. In any event the State Courts' holding was that the Commissioner was acting as agent of the Transit Authority, which is not an arm of the federal government, disposes of that argument.

questions." That is to say, this Court condemned Section 903 because it was the Fifth Amendment and that alone—no matter as to what subject—which caused automatic dismissal under it. That is *not* the present case. Section 903 of the New York City Charter is not involved. The concern of the New York Security Risk Law is completely different. Its concern is precisely with "the subject matter of the questions;" with determining fitness for security employment; with determining whether substantive reason exists which demonstrates the employee to be "of doubtful trust and reliability".

5. It was the summary dismissal by the employer under Section 903 of the New York City Charter without "inquiry" by the employer which this Court deemed lack of due process in the *Slochower* case. That is *not* this case. The employer here *did* make the "inquiry" of appellant. Appellant had four appearances before the Commissioner of Investigation acting on behalf of the New York City Transit Authority (R. pp. 10-15). He was advised of the provisions of the Security Risk Law and "given an opportunity to reconsider" his refusal to answer. On two of his appearances he appeared with counsel. He had 30 days after his suspension to submit statements or affidavits to show why he should be reinstated. In the letter of suspension he was given the reason therefor. He thus had the "charge being made against him" and the "opportunity to explain". He had the "charge" once more in the letter terminating his employment. He had the opportunity to appeal to the State Civil Service Commission pursuant to

Section 1106 of the Security Risk Law, with all of the added opportunities for further inquiry which such appeal affords, *supra* pp. 7-8.

POINT III

Appellant was not discharged for membership in the Communist Party. Accordingly, no question of the validity of a discharge on such ground is before the Court, and this Court, in keeping with its policy of refraining from reaching constitutional issues unless necessary, will not consider the question. Moreover, appellant's arguments on the subject are adverse to prior decisions by this Court and the principles on which they are based.

Appellant was not discharged as being a member of the Communist Party. The Court of Appeals so held (Op., R. p. 63). He was not discharged as or *un*doubted trustworthiness and reliability for refusing to answer the question as to Communist Party membership. He was discharged because he had by refusing to say whether he was a member created "doubt" as to his trustworthiness and reliability*.

Because appellant was not discharged for party membership, there is "not" before the Court "the question

* Appellant argues that there was no "evidence" presented justifying doubt of trustworthiness and reliability. Evidence in a case to support the decision may, of course, come from either side. In this case it came from appellant. The Security Risk Law (§ 1107) notes certain items of evidence upon which the determination of doubtful trust and reliability "may" be based but to which the employer and the State Civil Service Commission is not "limited" in reaching its determination. Appellant, by refusing to answer the basic question to which the employer had the right to have an answer from him, gave the "evidence" of doubtful trust and reliability upon which the Transit Authority reached its determination (Court of Appeals op., R. p. 64).

whether * * * [the employer] may determine that an employee's disclosure of such political affiliation justifies his discharge" (*Garner* v. *Los Angeles Board, supra,* 341 U. S. at p. 720). This is in accord with this Court's policy of not reaching questions of constitutionality until they are inescapable (*Peters* v. *Hobby,* 349 U. S. 331, 338 [1955]); in accord with its policy of refusing to "anticipate constitutional questions" or to decide "abstract constitutional issues" (*United States* v. *Auto. Workers,* 352 U. S. 567, 590, 591, 592 [1957]); in accord with its policy against passing upon the validity of statutory provisions "'unless absolutely necessary to a decision of the case', *Burton* v. *U. S.,* 196 U. S. 283, 295" (id. p. 590)*.

Point IV of appellant's brief is composed of arguments he might have been constrained to make had he responded that he was a member of the Communist Party, and are, moreover, counter to principles enunciated by this Court in *Adler* v. *Board of Education, supra,* 342 U. S. 485, *American Communications Association* v. *Douds, supra,* 339 U. S. 382, among other cases.

Again, because the question of membership in the Communist Party is not in issue, the question of the element of knowledge of the purposes of the Communist Party on the part of one who conceded membership therein would not be considered by the Court in this case. Since appellant discussed it, we would merely refer to the Feinberg

* Since the ground of dismissal in this case was refusal to answer the question as to Communist Party membership and since this ground warranted the discharge, the Court will therefore also not reach the questions of constitutionality appellant raises (Br., Point III) because the Transit Authority's resolution terminating appellant's employment mentioned that there were other activities on appellant's part which gave reasonable ground for belief that he was not a good security risk.

Law, upheld in *Adler* v. *Board of Education, supra,* where *scienter* was also not required by the language of the statute. But the Court of Appeals of New York construed the law as requiring it (301 N. Y. 476, 494 [1950]). It is to be presumed that to avoid unconstitutionality (*Peo.* v. *Bradley,* 207 N. Y. 592, 610-611 [1913]) the State Courts of New York will construe this law as requiring *scienter.* The question of *scienter* in the Security Risk Law has not been before the Court of Appeals of New York, because the instant case is the only one involving the Security Risk Law which has reached that Court, and the question of membership in the Party is not in this case. This Court, in keeping with its policy, will not pass upon the question until the State Court has had the opportunity to do so. (*Adler* v. *Board of Education, supra,* 342 U. S. at p. 496.)

Conclusion

The issue in this case is the single one we have stated. Appellant has, in his brief, said many things which we have refrained from answering in the interest of not submitting a brief constituted of a chain of rejoinders on subjects and propositions of constitutional law which have no bearing on this case. We have limited ourselves to the question presented on this appeal, and to responding to theories appellant has particularly pressed, notwithstanding that they are in fact not relevant to this case.

There is nothing in the Security Risk Law, certainly nothing in those provisions of the law involved in this case or the application of it in this case, which raise any issues of freedom of speech, belief, assembly or association.

The principles upon which the issue in this case turns are those we have reviewed in Point I, A. *supra,* and

which this Court has applied within recent years in cases which raised like issues.

The decision of the Court of Appeal raises no Federal question which this Court has not already decided, and with which the Court of Appeals decision is not in accord and harmony.

The decision of the Court of Appeals should be affirmed.

Dated: February 21, 1958.

Respectfully submitted,

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